87-5266

CASE NUMBER 87 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JERRY HERBERT JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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On Writ of Certiorari to the United States Circuit Court of Appeals, Eleventh Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether a general verdict in a RICO cases must be set aside when the jury was instructed that it could rely on any two predicate acts of stolen property (copyright infringement activities) or wire fraud and the stolen property concept submitted to the jury is subsequently determined to be invalid if there is a meaningful probability that the verdict rested exclusively on the invalid allegations?

Whether **Dowling** constructively amends an indictment that had been interwoven with the conclusion that Section 2314 is broad enough to encompass copyright infringement activity?

## PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

In addition to Jones and the respondent, the proceedings before the Eleventh Circuit Court of Appeals included George Washington Cooper, III, Ferrol "Bud" McKinney and John C. McCulloch. John C. McCulloch has filed a petition for writ of certiorari herein. This matter should be consolodated with any petition filed by others named herein.

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## STATUTES

Petitioner, Jerry Herbert Jones, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on June 8, 1987.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit adopting the order and memorandum opinion of the District Court's opinion in **Cooper v. United States**, 639 F.Supp. 176 (M.D. Fla. 1986) is attached as Appendix A.

## JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on June 8, 1987. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

## STATUTES INVOLVED

Initially, the focal point of this case was the interpretation and construction of Title 18 U.S.C. Section 2314 which relates to the interstate transportation of stolen property (ITSP). This statute is set forth in Appendix B. The operative facts here were characterized as copyright infringement activities in **Dowling v. United States,** 473 U.S. ____, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985).

Pertinent sections of the copyright statute, Title 17, Sections 106 and 506 are contained in Appendix C.

RICO convictions remain - a conspiracy in violation of Title 18, U.S.C. Section 1962(c) as defined by Title 18 U.S.C. Section 1961 and a violation of Title 18 U.S.C. Section 1961(4). Pertinent sections are contained in Appendix D.

## STATEMENT OF THE CASE

On July 29, 1980, Jerry Herbert Jones was indicted in Jacksonville, Florida. The indictment is interwoven with references to Title 18 U.S.C. Section 2314 which relates to the interstate transportation of stolen property (ITSP). The

seventy-eight (78) count indictment names eighteen defendants.

A conspiracy in violation of Title 18, U.S.C. Section 1962(c) through a pattern of racketeering activity as defined by Title 18, U.S.C. Section 1961 is alleged in count one. The government premised the case against Jones on the concept that the aggregation of sounds fixed on copyrighted recordings were reproduced without authorization of the copyright owner and transported in interstate commerce and this activity violated Title 18 U.S.C. Section 2314. This RICO conspiracy was alleged to be an eight track and cassette tape copyright infringement scheme.

The alleged pattern of racketeering activity was that the defendants would cause to be transported in interstate commerce, goods, wares and merchandise of a value in excess of $5,000.00, this being the aggregation of sounds fixed upon the unauthorized tapes in violation of 18 U.S.C., Section 2314. Violations of Title 18, U.S.C. Section 1343 (information to avoid detection communicated between the parties to the scheme) and Title 18, U.S.C. Section 1341 (use of the mails to execute the scheme) are also alleged in count one as part of the conspiracy. That is - telephone communications and mails were utilized by defendants for the purpose of executing a scheme to defraud copyright owners.

Violations of Title 18 U.S.C. Section 1961(4) are alleged in count two which incorporates all allegations of count one; the violation is by reason of a group of individuals associating to operate an eight track and cassette tape copyright infringement scheme. The pattern of racketeering activity charged included violations of Title 18 U.S.C. Section 2314 which were alleged as substantive offenses in counts three through ten; these consisted of the interstate transportation of unauthorized copies of sound recordings. Violations of Title 18 U.S.C. Section 1343 (wire fraud) in implementing the substantive offenses are also alleged in count two and these

are charged separately as substantive offenses in counts eleven through forty-nine.

A violation of Title 18, U.S.C. Sections 106(1)(3) and 506(a) is alleged in count fifty consisting of a conspiracy to infringe the copyright in various sound recordings.

Jones urged in a motion to dismiss that the indictment was defective because the copyright infringements alleged were not sufficient to constitute an ITSP violation and the RICO counts were poisoned by the defective ITSP concept - because copyright infringements were not sufficient to constitute "stolen property" violations - these were being used as predicate offenses for the RICO violations. Motions to suppress raised the same point, the wiretaps utilized to gather evidence were authorized for the ITSP charges on the concept that a copyright infringement can be the underlying factual basis for a Section 2314 violation and defendants urged that the interception of wire communications authorized by Title 18, U.S.C. 2516 was not permissible on the facts submitted. The motions were denied.

After several weeks of trial, Jones was convicted of a RICO conspiracy, a RICO substantive offense, multiple ITSP counts, wire fraud and a conspiracy to violate a copyright. He was sentenced under each count.

The Eleventh Circuit rejected the appeal in **United States v. Drum**, 733 F.2d 1503 (11th Cir. 1984) stating:

> "We have previously noted that copyrights, once given tangible form, may be 'stolen, converted or taken by fraud' and fall within the reach of Section 2314"

This Court denied certiorari in this case, 105 S.Ct. 543 (1984). However, the same issue was dealt with in **Dowling v. U.S.**, 105 S.Ct. 3127, 87 L.Ed. 2d 152 (1985). **Dowling** vindicated the position of Jones and others who had contended that (misdemeanors) copyright infringement activities should not be construed as a theft of goods, wares or merchandise under Section 2314.

Relying on **Dowling**, Jones filed a motion pursuant to Title 28 U.S.C. Section 2255 seeking to vacate and set aside all convictions. Convictions on six counts (four through nine) pursuant to Section 2314 were set aside as to Jones - the motion was denied as to the RICO and RICO conspiracy convictions. This reduced Jones from a ten year sentence to a total aggregate sentence of five years. The trial court viewed this result as one which would thwart the sentencing plan. Jones and others were resentenced so they would have the orginal time of incarceration. No benefit in sentencing was derived from the fact numerous ITSP convictions had been set aside, **Cooper v. United States**, 639 F.Supp. 176 (M.D. Fla. 1986).

The judgment and sentence imposed after the ITSP convictions had been set aside was appealed. The Eleventh Circuit adopted the district court's opinion, Appendix A.

**REASONS FOR GRANTING THE WRIT**

It is impossible to ascertain whether convictions of RICO conspiracy and RICO are based upon criminal conduct. The focus of the indictment and trial was on copyright infringement activity but Jones was not charged with any copyright infringement. Jones was convicted of various violations of Section 2314 based upon copyright infringement activities and these substantive offenses have been vacated.

The government has no way of establishing that the jury did not rely exclusively on the Section 2314 violations in reaching the RICO conspiracy and RICO verdicts of guilty. The government has successfully urged that the wire fraud convictions can support the RICO convictions. There is nothing to support this alternative over the defective Section 2314 theory. Moreover, there is nothing to indicate that the jury did not rely upon the defective 2314 theory in reaching the verdicts of guilty on wire fraud - wire fraud being a parasitic offense requiring a host of some kind. Other hosts

are possible but nothing is more probable than the Section 2314 copyright concept which is not excluded in any way.

Count one of the indictment alleges a RICO conspiracy and contains the following allegation which marks the problem:

> "3. The said pattern of racketeering activity, as defined by Title 18, United States Code, Sections 1961(1) and (5) consisted of the following:
>
> a. It was part of said conspiracy that the defendants would directly and indirectly, knowingly, willfully and unlawfully transport and cause to be transported in interstate and foreign commerce goods, wares and merchandise of a value in excess of $5,000, that is, the aggregation of sounds fixed upon unauthorized and unlawfully made phonorecords and tapes of duly copyrighted sound recordings, knowing the same to have been stolen, converted and taken by fraud, that is, willfully and unlawfully reproduced without authorization of the copyright owner, for purpose of commercial advantage and private financial gain, which acts are indictable under Title 18, United States Code, Section 2314, including but not limited to those acts in a pattern of racketeeriing activity which are charged substantively in Counts THREE through TEN of this Indictment, which are realleged and incorporated by reference in this Count as if set forth fully herein.
>
> b. It was further a part of said conspiracy that defendants would directly and indirectly, willfully and knowingly transmit and cause to be transmitted in interstate commerce by means of a wire communication, certain signs, signals and sounds, that is, telephone communications, for the purpose of executing a scheme and artifice to defraud copyright owners, sound recording companies, recording artists and musicians, the public and other individuals and businesses dealing in & purchasing phonorecords, tapes and sound recordings, and thereby, . . ."

Count two alleges a substantive RICO violation. Count one is incorporated in count two.

Jones was convicted of violations of Section 2314 on the theory that a copyright infringement can form the basis for a theft of "goods, wares and merchandise" described in that statute. Jones was convicted in counts 13, 14, 15, 16, 17, 18, 19 and 21 of violations of Title 18, U.S.C., Section 1343 (Wire Fraud). The wire fraud counts allege that they were part of a scheme set forth in paragraph 3(b) of Count I. Paragraph 3(b) of Count one alleges that it was "a part of said conspiracy" that the defendants would utilize telephone communications.

**1. The Conflict with Brown:**

The writ should be granted in this case because of the direct conflict between **Jones**, the subject case from the Eleventh Circuit and **United States v. Brown**, 583 F.2d 659 (3rd Cir. 1978) cert denied, 440 U.S. 909 S.Ct. 1217, 59L.Ed.2d 456 (1979). The opinion and order denying relief to Jones, specifically acknowledges that if the rationale of **Brown** was applied, it would be necessary to set aside the RICO convictions. Instead, the reasoning in **United States v. Peacock**, 654 F.2d 339 (5th Cir. 1981), cert denied, 464 U.S. 965 (1983) was expanded beyond the limits of reason.

In **Jones**, RICO convictions have been upheld because two predicate acts are left after discounting the vacated convictions. After the Section 2314 convictions were vacated, wire frauds are identified as the acts relating to the criminal enterprise which the jury could have relied upon as the predicate acts necessary for the RICO convictions.

**United States v. Brown**, 583 F. 2d 659 (3rd Cir. 1978), is a RICO case; defendants appealed their convictions for using extortionate means to collect, for conspiracy, for mail fraud, for conducting the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity and a RICO conpiracy.

On appeal, it was determined that the mail fraud counts were defective. The racketeering activity alleged consisted of the evidence underlying the substantive count of extortion and the counts of mail fraud. The jury was charged that a finding of guilt under two substantive counts could support a RICO conviction and RICO conspiracy conviction. Since the jury might have relied upon a mail fraud count, where the evidence was insufficient, in reaching verdicts on the RICO counts - the RICO convictions must be reversed. Substantive convictions and evidence sufficient to support RICO convictions remained but there was no way of ascertaining

which aspects the jury relied upon in reaching the verdicts.

**2. The Conflict with Stromberg - Leary, Bachellar and Chiarella:**

In other contexts, this Court has consistently expressed the view set forth by the Third Circuit in **Brown.** In **Stromberg v. California,** 283 U.S. 359, 51 S.Ct. 532, 75 L. Ed. 1117 (1930), Stromberg was convicted under a statute with three clauses pertaining to displaying flags or symbols in (1) opposition to organized government, (2) inviting anarchistic action or (3) as an aid to propaganda of a seditious character. There was a general verdict that did not specify the ground upon which it rested. The first clause was impermissibly vague and declared invalid. This required a reversal of the conviction since the jury may have based the verdict on the invalid first clause.

In **Leary v. United States,** 395 U.S. 6, 31-32, 89 S.Ct. 1532, 1545-1546, 23 L.Ed.2d 57 (1967), A statute was declared unconstitutional which provided that a jury could infer from the fact of possession - that marijuana was illegally imported. The jury was instructed that it could base a verdict of guilt on either of two alternative theories - one being the challenged presumption that it was illegally imported. The unconstitutionality of one alternative required a reversal.

In **Bachellar v. Maryland,** 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970), defendants participated in an anti-Vietnam War demonstration. Defendants were charged with disturbing the peace and being disorderly under a Maryland statute that permitted an instruction that authorized a guilty verdict if defendants engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." This provision was unconstitutional. The jury was instructed about alternative grounds upon which defendants might be found guilty. There was a general verdict that did not specify the basis for the

finding of guilt. Defendants may have been found guilty because they advocated unpopular ideas - the jury could have rested its verdict on any number of grounds but if it cannot be determined upon the record that the defendants were not convicted under the invalid clause - the conviction cannot be upheld.

In **Chiarella v. United States,** 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), an employee of a printing company obtained inside stock information and acted thereon. He was prosecuted under the theory that he owed a duty of disclosure to the sellers and violated Section 10(b) of the Securities Exchange Act of 1934. The majority concluded that this theory did not apply in this instance. The following is noted:

> "The conviction would have to be reversed even if the jury had been instructed that it could convict the petitioner either (1) because of his failure to disclose material, nonpublic information to sellers or (2) because of a breach of a duty to the acquiring corporation. We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. **United States v. Gallagher,** 576 F.2d 1028, 1046 (CA3 1978); see **Leary v. United States,** 395 US 6, 31-32, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969); **Stromberg v. California,** 283 US 359, 369-370, 75 L.Ed. 1117, 51 S.Ct. 532, 73 ALR 1484 (1931)."

This Court has been quick to apply the **Stromberg** rule where the jury could have considered constitutional activities as criminal conduct and more hesitant to apply **Stromberg** in the sentencing context. see **Kant v. Stephens,** 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983) and the discussion therein.

These factors do not in any way blunt the claim of **Jones** that the reasoning inherent in **Stromberg** should be applicable in his case.

**3. The Conflict With Non-RICO Conspiracies:**

There is no apparent reason to confine the **Stromberg** rule to single count indictments. A catalog of cases consistently apply the concept in multiple count indictments - a court cannot speculate on the basis for a jury verdict when it could rest on valid or invalid grounds. The most frequent incident

in conspiracy cases is where the evidence is insufficient in some respect.

**United States v. Dansker,** 537 F.2d 40, (3rd Cir. 1976), **United States v. Tarnapol,** 561 F.2d 466, (3rd Cir. 1977), **United States v. Carman,** 577 F.2d 556 (9th Cir. 1978), **United States v. Irwin,** 654 F.2d 671 (10th Cir. 1981), are conspiracy cases in which the evidence was deemed insufficient on an underlying substantive offense which also could have been a basis for a verdict of guilty on conspiracy. Each case required reversal because it could not be determined whether the conspiracy verdict was on an object deemed insufficient.

The same result was reached in **Van Liew v. United States,** 321 F.2d 664, 672 (5th Cir 1963) and **United States v. Kavazanjian,** 623 F.2d 730 (1st Cir. 1980), where an underlying substantive offense was set aside as non-criminal under the facts.

**4. The Limit of Peacock:**

The **Brown** rule is that any underlying substantive offense that is defective and which could have formed the basis for RICO convictions requires a reversal of the RICO convictions absolutely. In **Peacock,** there was a reversal of an underlying substantive offense and the RICO convictions were sustained. **Peacock** does not say that any substantive offense which could possibly form the basis for the predicate acts of a RICO conviction will safeguard RICO convictions. **Jones** goes beyond **Peacock** since implicit in the **Jones** result is the rule that where featured substantive offenses that could have been the basis of the jury verdict are known to be defective, any substantive offenses that the jury could have relied upon will safeguard the RICO convictions. In **Jones,** there is no requirement of any certainty in the verdict.

In **Peacock,** there was a racketeering enterprise characterized as "an arson ring" - the evidence and counts were carefully reviewed and on the record, it was determined

that some of the counts operated like special verdicts and it could be conclusively determined that each defendant had been found by the jury to have been guilty of at least two racketeering acts which were related to the arson enterprise. The insufficient evidence on incidental counts which could have also been underlying predicate acts did not require reversal where the record precluded any doubt as to the propriety of the RICO convictions.

The record in **Jones** does not permit the construction of a substitute for a special verdict. Based on the indictment, evidence and instructions - there is no reason to believe that the jury did not rely exclusively upon the defective Section 2314 theory. In **Jones,** a criminal conviction has been upheld when it is not possible to ascertain whether the defendant is being punished for criminal or non-criminal conduct. This is beyond **Peacock. Peacock** recognized a need for some reasonable certainty in a verdict.

**5. Amended Indictment, Reasonable Doubt and Due Process:**

At every stage - the indictment, motions, evidence, argument and instructions, the government position was that pirated tapes form a proper basis for charging a violation of 18 U.S.C., Section 2314, which in turn provides a proper basis for establishing the predicate acts necessary for the RICO convictions. The jury was necessarily influenced by these alleged Section 2314 violations because they returned guilty verdicts thereon. The perspicuous risk is that the jury was misled and relied on the invalid predicate acts.

**Dowling** removes major portions of the indictment subsequent to the trial. Thus, defendants were not tried on the indictment as it now reads. At trial, the RICO and wire fraud counts were not independent of the Section 2314 defect. It cannot be presumed what indictment would be returned by a grand jury had the grand jury been aware that the ITSP

allegations were a nullity.

Rule 7(c), Federal Rules of Criminal Procedure provides:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Rule 7(e), Federal Rules of Criminal Procedure provides:

> "The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

It cannot be argued that Jones was tried on a plain and concise statement of the essential facts of the offense charged when the indictment contains material purporting to be allegations of fact which are an erronerous interpretation of a statute, 18 U.S.C. Section 2314.

No grand jury has returned the indictment as it is modified by **Dowling**. The Fifth Amendment of the Constitution of the United States provides in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ."

The government cannot say that the grand jury was not influenced by the concept of the subject facts triggering the provisions of Title 18, Section 2314. It is unknown what form the indictment may have taken if the grand jury had been apprised that copyright infringements were misdemeanors rather than felonies under Section 2314.

**Russell v. United States,** 369 U.S. 749 770-772, 8 L.Ed 2d 240, 82 S.Ct. 1038 (1962) states it is settled that an indictment may not be amended except by grand jury. The purpose of the requirement of a grand jury indictment is to limit the power of both the prosecuting attorney and judge. It is not uncommnon for an indictment to be narrowed - counts are dropped without this constituting an amendment, **United States v. Miller,** 471 U.S. 130, 107 S.Ct. 1811, 85 L.Ed.2d 99 (1985). This occurs when the counts are independent. The situation is different here - the counts are interwoven with the Section

2314 theory. An indictment is amended when it is so altered as to charge a different offense from that found by the grand jury. The offense charged by the grand jury is one in which Section 2314 is violated by copyright infringement activities and these felonies are predicate acts for a RICO enterprise and the basis of a RICO conspiracy. Separating after trial what was united in the trial is a risky business not only for a defendant but for the integrity of the judicial process.

Except for **Jones**, implicit in each decision dealing with a **Stromberg** problem, is the concept that reasonable doubt exists as a matter of law when the record and verdict do not permit any certainty as to the basis of guilt and the verdict could have been on defective grounds. If a jury has condemned a defendant for reasons that as a matter of law cannot support the verdict, this may offend the Due Process Clause.

**6. The Importance of the Question Presented:**

Jones has been incarcerated for several years so this is more than an academic question for the individual. The issue presented is not some after thought contrived for an appellate point. Prior to trial, Jones challenged the government theory of copyright activity being within the purview of Section 2314. Jones also precisely identified this mischief - defective predicate acts being utilized in the indictment for the RICO counts.

The legislative history of the RICO statutes leaves no question about the intent of Congress - these are additional weapons with enhanced penalties designed for exceptionally heinous criminality. Here, the prosecution selected misdemeanors - copyright infringement activities as a target of the RICO statutes. In this setting, it may not be appropriate to provide the government with the ability to convict without knowing whether the jury based the verdict of guilty on criminal conduct.

The number of RICO cases currently being prosecuted and the nature of the offenses - optional predicate offenses within an offense - creates a situation which needs some pronouncement from this Court. **Brown** seems to say that the concept of a conviction being based on the exclusion of reasonable doubt means that no ponderable risk is acceptable. **Jones** permits a verdict to remain intact when it is completely unknown whether vacated offenses were the basis for RICO convictions - rejecting the precepts of **Stromberg** and its progeny in the context of RICO cases. Applying some facet of the **Stromberg** rationale in a RICO case must be appropriate. The prosecution can fully protect cases by special verdicts or by refraining from drafting speculative indictments. The disparity between **Brown** and **Jones** does not satisfy the need for the uniform application of a criminal statute.

## CONCLUSION

The jury was instructed that it could convict a defendant who agreed to commit any two of the Section 2314 counts or wire fraud counts. Wire fraud does not require an agreement and may be performed by one person, **Isaac v. United States**, 301 F.2d 706 (8th Cir. 1962). It is not known what particular scheme was perceived by the jury in returning the wire fraud convictions. Denying relief sought in the Section 2255 motion, the trial court noted that the wire fraud counts did not include an allegation that the fraud consisted of the interstate transportation of stolen property. But! The wire fraud counts do not reference the copyright statute either. No juror had any reason to suspect that the alleged Section 2314 activity could not be considered as a basis for wire fraud violations. So far, the prosecution has not shown why the jury did not rely exclusively on the Section 2314 theory in reaching the RICO convictions - or how it is known that the jury did not rely exclusively on the invalid predicate acts.

The possibility that the jury could have considered the copyright statute in finding wire fraud and the possibility that the jury relied on wire fraud in reaching the RICO verdicts does nothing in the way of providing a solution. The problem is that there is nothing in the record which provides any assurance that the jury relied on anything except the defective Section 2314 theory. Jones is incarcerated not on the basis of the indictment that was returned and the verdict thereon but a guess from the prosecutor and judiciary as to what may have been involved in the deliberations - or would be on the indictment as it now reads.

A RICO conviction cannot be permitted to rest on some random guess. The result must be reversed on the rationale of **Brown** and **Stromberg** which require that there be some reasonable certainty as to the acts the jury found were part of the RICO enterprise and what agreement existed.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have mailed three copies of the petition for writ of certiorari on behalf of petitioner, Jerry Herbert Jones, dated August 7th, 1987, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 7th day of August, 1987 and a copy of the foregoing petition for certiorari has been furnished to:

Curtis S. Fallgatter, Esquire
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by mail, this 7th day of August, 1987.

Attorney

# United States Court of Appeals
## FOR THE ELEVENTH CIRCUIT

No. 86-3452

D.C. Docket No. 80-67

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JERRY HERBERT JONES,
FERROL "BUD" McKINNEY, and
JOHN C. McCULLOCH,

Defendants-Appellants.

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Appeals from the United States District Court for the Middle District of Florida

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Before RONEY, Chief Judge, FAY, Circuit Judge, and ATKINS*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of conviction of the said District Court in this cause be and the same are hereby, AFFIRMED.

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*Honorable C. Clyde Atkins, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

Entered: June 8, 1987
For the Court: Miguel J. Cortez, Clerk
By: David Maland
Deputy Clerk

ISSUED AS MANDATE: JUL 13 1981

Before RONEY, Chief Judge, FAY, Circuit Judge, and ATKINS*, Senior District Judge.

PER CURIAM:

The judgment appealed is AFFIRMED based upon the district court's opinion in Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986).

*Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation

APPENDIX B

18 U.S.C. Section 2314

**Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting**

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof --

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

APPENDIX C

17 U.S.C. Section 106. **Exclusive rights in copyrighted works**

Subject to sections 107 through 118 (17 USCS Sections 107-1181), the owner of copyright under this title (17 USCS Sections 101 eet seq.) has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies of phonorecords;

(2) to distribute derivative works based upon the copyrighted works;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes and pictorial graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

(Added Oct. 19, 1976, P.L. 94-553, Title 1, Section 101, 90 Stat.2546.)

17 U.S.C. Section 506. **Criminal offenses**

**(a) Criminal infringement.** Any person who infringes a copyright willfully and for purposes of commercial advantage or private financcial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: Provided, however, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsection (1),(2), or (3) of section 106 [17 USCS Section 106 (1).(2), or (3)] or the copyright in a motion picture afforded by subsections (1), (3), or (4) of section 106 [17 USCS Section 106(1),(3) or (4)] shall be fined not more than $25,000 or imprisoned for the first suc: offense and shall be fined not more than $50,000 or imprisonec for not more than two years, or both, for any subsequent offense.

**(2) Forfeiture and destruction.** When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

**(c) Fraudulent copyright notice.** Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows is to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such

notice or words that such person knows to be false, shall be fined not more than $2,500.

**(d) Fraudulent removal of copyright notice.** Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined no more than $2,500.

**(e) False representation.** Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409 [17 USCS Section 409], or in any written statement filed in connection with application, shall be fined not more than $2,500.

(Added Oct. 19, 1976, P.L.94 --553, Title 1, Section 101, 90 Stat. 2586.)

## APPENDIX D

(Pertinent RICO provisions)

18 U.S.C. Section 1962. **Prohibited Activities.**

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

18 U.S.C. Section 1961. **Definitions.**
As used in this chapter --

(1) 'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 210 (relating to bribery), Section 224 (relating to sports bribery), Sections 471, 472 and 473 (relating to counterfeiting), Section 659 (relating to theft from interstate shipment) if the act indictable under Section 659 is felonious, Section 664 (relating to embezzlement fromm pension and welfare funds), Sections 891-894 (relating to extortionate credit transactions), Section 1084 (relating to the transmission of gambling information), Section 1341 (relating to mail fraud), Section 1343 (relating to wire fraud), Sections 1461-1465 (relating to obscene matter), Section 1503 (relating to obstruction of criminal investigations), Section 1511 (relating to the obstruction of State or local law enforcement), Section 1951 (relating to interference with commerce, robbery or extortion), Section 1952 (relating to racketeering), Section 1953 (relating to interstate transportation of wagering paraphernalia), Section 1954 (relating to unlawful welfare fund payments), Section 1955 (relating to prohibition of illegal gambling businesses), Sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), Sections 2314 and 2315 (relating to interstate transportation of stolen property), Section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), Sections 2341-2346 (relating to trafficking in contraband cigarettes), Sections 2421-24 (relating to white slave traffick), (c) any act which is indictable under Title 29, United States Code, Section 186 (dealing with restrictions on pyments and loans to labor organizations), or Section 501(c) (relating to embezzlement from union funds), (d) any offense involving fraud connected with a case under Title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any

law of the United States, or (e) any act which is indictable under the Currency and Foreign Transportations Reporting Act;"

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

EDITOR'S NOTE

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ORIGINAL



Nos. 87-5170 and 87-5266

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN C. McCULLOCH, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY H. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners' racketeering convictions were subject to collateral attack because their convictions on some of the predicate acts, also charged as substantive crimes, were invalidated in response to this Court's decision in Dowling v. United States, 473 U.S. 207 (1985), when several convictions for wire fraud remained valid and supplied more than the requisite number of racketeering acts.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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87-5170

JOHN C. McCULLOCH, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The judgment order of the court of appeals (87-5170 Pet. App. 1a-2a) is unreported. The opinion of the district court is reported at 639 F. Supp. 176.

## JURISDICTION

The judgment of the court of appeals was entered on June 8, 1987. The petition for a writ of certiorari in No. 87-5170 was filed on July 27, 1987; the petition in No. 87-5266 was filed on August 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Middle District of Florida, petitioners and others were on March 4, 1981, convicted on various counts relating to the operation of an enterprise involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. Petitioners were each convicted on one count of conspiracy to conduct an enterprise involving illicit reproduction of eight-track and cassette tapes through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Count 1); a substantive RICO offense, in violation of 18 U.S.C. 1962(c) (Count 2); interstate transportation of the pirated tapes, in violation of 18 U.S.C. 2314 (Counts 4-9); and conspiracy to violate the copyright laws, in violation of 18 U.S.C. 371 (Count 50). Petitioners also were convicted on several counts of wire fraud, in violation of 18 U.S.C. 1343, petitioner McCulloch on five counts (Counts 20-24), and petitioner Jones on eight counts (Counts 13-19 and 21). Petitioner Jones was sentenced to a total of ten years' imprisonment; petitioner McCulloch was sentenced to a total of five years' imprisonment. _/ The court of appeals

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_/ Petitioners' sentences were distributed over the various counts as follows:

> McCulloch was sentenced to consecutive terms of two years on Count 1, two years on Count 2, and one year on Count 4. He was also sentenced to concurrent terms of two years on each of Counts 5-9, two years on each of Counts 20-24, and one year on Count 50, all of these sentences to run concurrently with the sentence on Count 1.
>
> Jones was sentenced to terms of two years each on Counts 1, 2, 4, 5, and 6, each sentence to run consecutively. He was also sentenced to concurrent terms of two years each on Counts 7, 8, 9, and 13, five years each on Counts 14-19 and 21, and one year on Count 50, all of these sentences to run concurrently with the sentences on Counts 1, 2, and 4.

affirmed (United States v. Drum, 733 F.2d 1503 (11th Cir. 1984)), and this Court denied certiorari (469 U.S. 1061 (1984)).

Subsequently, this Court issued its decision in Dowling v. United States, 473 U.S. 207 (1985), in which it held that criminal penalties could not be imposed under the National Stolen Property Act, 18 U.S.C. 2314, for the interstate transportation of pirated records or tapes. Petitioners then moved, pursuant to 28 U.S.C. 2255, to have their convictions under that statute, as well as some of their other convictions, set aside. The district court vacated the convictions under 18 U.S.C. 2314 but rejected petitioners' arguments that their RICO and wire fraud convictions were also affected by Dowling. Cooper v. United States, 639 F. Supp. 176 (M.D. Fla. 1986). The court of appeals affirmed in a judgment order, relying on the district court's opinion (87-5170 Pet. App. 1a-2a).

2. The evidence at trial showed that from 1974 through 1979 petitioners and others were involved in the manufacture and distribution of "pirated" eight-track and cassette tapes. Pirated tapes are made through unauthorized reproduction of copyrighted sound recordings. Petitioners conducted these operations in several states, including Florida, North Carolina, South Carolina, Kentucky, and Maine. By early 1979, the group had established three major interrelated and interdependent manufacturing operations, each of which bought and sold tapes and supplies from the others, shared information concerning law enforcement, and had common customers. During the time of the conspiracy, the entire enterprise manufactured, duplicated, and distributed over five million pirated tapes per year.

Petitioner Jones and co-defendant Ferrol McKinney worked together manufacturing pirated eight-track tapes. Jones duplicated the tapes and McKinney wound them, while another co-conspirator helped locate customers. Co-defendant Frances Lockamy assisted McKinney in processing orders for the pirated

tapes. Petitioners McCulloch and Jones picked up and delivered orders and raw materials. Co-defendant George Washington Cooper sold pirated tapes and provided Jones with background labels for pirated tapes. Tr. 1459-1469, 1477-1478, 1483-1489, 1491-1495, 1534-1535, 1545-1549, 1567-1569. _/

From October 1977 through June 1979, the FBI conducted an investigation of this enterprise, securing videotapes of the conspirators' conversations and the delivery and sale of pirated tapes. In addition, for a period during the spring of 1979, agents recorded conversations from the telephones of another co-conspirator, who later testified for the goverment at trial. The FBI eventually executed search warrants for the homes or business premises of several of the conspirators, including petitioner Jones. FBI agents recovered large quantities of pirated tapes and related supplies and equipment in the course of those searches.

3. In considering petitioners' motions for collateral relief, the district court concluded (639 F. Supp. at 178-179) that they were entitled to raise the issue of the validity of their convictions under 18 U.S.C. 2314, despite the fact that the same question had been decided against them on direct appeal, because there had been a significant change in the law by virtue of the Dowling decision, which could result in a finding that these convictions were "fundamentally defective." See Davis v. United States, 417 U.S. 333 (1974). The court then determined that the Dowling decision should be given retroactive effect, because it meant that petitioners had "been convicted of an act that the law no longer classifies as criminal" (639 F. Supp. at 179). Accordingly, the district court vacated petitioners' convictions on Counts 4-9, the counts based on the charge of interstate transportation of stolen property (ITSP) (ibid.).

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_/ "Tr." refers to the trial transcript, found in volume 29 of the record in the court of appeals on the direct appeal.

Petitioners further argued in their Section 2255 motions that their RICO convictions should also be vacated as no longer supported by the requisite predicate acts. Both RICO counts had alleged predicate acts of racketeering consisting of the various counts of wire fraud and interstate transportation of stolen property charged as substantive counts 11 through 49 of the indictment. 639 F. Supp. at 180, 187. In addition to the six ITSP counts on which both petitioners were convicted, petitioner McCulloch was convicted on five counts of wire fraud, and petitioner Jones on seven counts of wire fraud, all of which were alleged as predicate acts of racketeering in the RICO counts.

Petitioners argued, relying on United States v. Dansker, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), and United States v. Brown, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), that there was no way of telling on which predicate acts the jury had relied in convicting on the RICO counts. In Dansker, the Third Circuit reversed one of two substantive bribery counts because of the insufficiency of the evidence, and then also reversed the conspiracy count, which had alleged as its objective one or the other of the two bribes charged in the substantive counts. The same court extended Dansker in Brown, a case involving a RICO conviction. Once the court reversed for insufficiency of the evidence two of the substantive counts that were alleged as racketeering acts, the court felt bound by the reasoning of Dansker to reverse the RICO counts as well, despite the fact that two valid substantive counts remained. 583 F.2d at 669. By analogy, petitioners here argued that because the jury might have based the RICO convictions on two of the invalid ITSP counts, the RICO counts must be reversed.

The district court rejected this argument, relying instead on the contrary reasoning of the former Fifth Circuit in United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), cert. denied,

464 U.S. 965 (1983), which is controlling precedent in the Eleventh Circuit as well (639 F. Supp. at 181). The court in Peacock distinguished Dansker as a case that involved a conspiracy count alleging several possible objectives, where the jury's guilty verdict might have rested on an objective for which the evidence was insufficient. By contrast, the court reasoned, a RICO conviction requires only that the defendant be found guilty of two racketeering acts that are related to the affairs of the enterprise. Disagreeing with Brown, the court in Peacock concluded that as long as a defendant remained validly convicted of at least two racketeering acts, as revealed either in a special verdict or in the verdict on substantive counts, there was no reason to disturb the RICO conviction simply because some of the other substantive convictions were invalid. 654 F.2d at 348. The district court in this case, following the same reasoning, concluded that the RICO convictions remained valid because each petitioner had been convicted on multiple counts of wire fraud, leaving more than the minimum necessary predicate acts (639 F. Supp. at 182).

ARGUMENT

Petitioners here renew their challenge to their RICO convictions, claiming that the memorandum decision of the court of appeals affirming the district court in this case conflicts with the Third Circuit's holdings in Dansker and Brown, as well as with similar decisions of other circuits. First, the decision below was correct. Moreover, an examination of the cases shows that Brown was an unwarranted extension of Dansker and all the other conspiracy cases to which petitioners refer, so that the decision below does not even arguably conflict with any case except Brown, which has subsequently been limited and ignored by the Third Circuit. Finally, because Brown was decided on direct appeal while this case involves a collateral attack, there is no clear conflict between the results in the two cases.

1. As the former Fifth Circuit explained in United States v. Peacock (654 F.2d at 348), the Third Circuit's reasoning in Brown fails properly to understand RICO prosecutions. In order to sustain a conviction that rests on certain underlying findings -- such as a conspiracy or RICO verdict -- the court, of course, must be able to conclude that the jury did not rest its verdict on an invalid premise. In a RICO case, the verdicts on substantive counts that also constitute the predicate acts charged in the RICO offense serve the function of special verdicts, demonstrating that the jury did indeed find the defendant guilty of particular racketeering acts. If some of the convictions for predicate acts are later found invalid, but at least two valid convictions for underlying crimes remain, then it is still clear that the jury found the defendant guilty of at least two acts of racketeering for purposes of the RICO offense. This is especially true in this case where, as the district court noted (639 F. Supp. at 180), the wire fraud indictments incorporated the Government's account of the criminal conspiracy (id. at 186-187). The jury's decision to convict on the wire fraud counts therefore demonstrated that it found those acts of wire fraud to be in furtherance of the criminal enterprise charged in the substantive RICO and RICO conspiracy counts. _/ There is thus no reason to doubt that the jury made

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_/ Because the wire fraud indictments incorporated a description of the RICO enterprise, the Third Circuit might well find the RICO convictions here permissible under Brown. In United States v. Riccobene, 709 F.2d 214, 228, cert. denied sub nom. Ciancaglini v. United States, 464 U.S. 849 (1983), that court of appeals explained that RICO convictions will be upheld under Brown "when the reviewing court can determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge." It is but a small step from that proposition to the conclusion that the RICO convictions should be upheld when the court is confident that the jury did rely on unchallenged predicate offenses, whether or not it may also have considered others. Indeed, the Third Circuit has upheld a RICO conviction, without citing Brown, where it invalidated some of the predicate convictions but left standing two or more convictions for RICO predicate offenses (United States v. Boffa, 688 F.2d 919, 934 (1982), cert. denied, 460 U.S. 1022 (1983)).

the findings necessary for a RICO conviction, and the court of appeals decided this case correctly.

As this discussion of the structure of RICO prosecutions shows, the Third Circuit's decision in Brown goes beyond its decision in Dansker and does so incorrectly. _/ The situation in a RICO case is quite different from one where, in a conspiracy count alleging several different objectives, the jury has been instructed that it can convict on the basis of any one objective. If any of those objectives is later found invalid or insufficiently proved, then the problem is that it cannot be determined whether the jury rested its verdict on an impermissible basis. United States v. Dansker, 537 F.2d at 51. Each of the cases other than Brown on which petitioners rely is similar to Dansker, involving multiple-object conspiracy counts where the jury was instructed that it could find any one of the objects in order to convict. United States v. DeLuca, 692 F.2d 1277, 1281 (9th Cir. 1982); United States v. Irwin, 654 F.2d 671, 680 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Kavazanjian, 623 F.2d 730, 739 (1st Cir. 1980); United States v. Carman, 577 F.2d 556, 566-568 (9th Cir. 1978); Van Liew v. United States, 321 F.2d 664, 672 (5th Cir. 1963). _/

2. The court of appeals in Peacock acknowledged its disagreement with the Third Circuit in Brown and refused to extend the reasoning of Dansker to the RICO context (654 F.2d at

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_/ No other court of appeals has adopted the reasoning in Brown. Both the Seventh Circuit (United States v. Anderson, 809 F.2d 1281, 1285 (1987)) and the Ninth Circuit (United States v. Lopez, 803 F.2d 969, 976 (1986), cert. denied, No. 86-6397 (Apr. 27, 1987)) have referred to Brown in cases where they found it inapplicable to the facts at hand; the Ninth Circuit specifically noted that it had not adopted the rule of Brown (ibid.).

_/ Even in that situation, however, some courts uphold the conspiracy counts. See, e.g., United States v. Dixon, 536 F.2d 1388, 1401-1402 (2d Cir. 1976); United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Tanner, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); Moss v. United States, 132 F.2d 875, 878 (6th Cir. 1943).

348). Similarly, the district court in this case noted the disparity between the two courts of appeals (639 F. Supp. at 181). The decision here, however, does not actually conflict with the decision in Brown, which involved a direct appeal rather than a collateral attack. _/

As noted above, the district court in this case concluded that petitioners were entitled to the benefit of this Court's decision in Dowling, although their convictions already had been affirmed, because conviction for acts no longer considered criminal constitutes a "complete miscarriage of justice." See Davis v. United States, 417 U.S. at 346. Thus they were entitled to relief under 28 U.S.C. 2255, and the district court properly vacated their convictions for interstate transportation of stolen property. It is quite another matter, however, to make the derivative claim that vacation of the ITSP counts further mandates reversal of the RICO counts, particularly when the jury's verdicts of guilty on each of the substantive wire fraud counts specifically show that petitioners were found guilty of more than the requisite number of racketeering acts. As our discussion above demonstrates, reversal of the RICO conviction because of unrealistic and attenuated doubts as to the basis for the jury's verdict is a questionable action on direct appeal; there is certainly no reason to allow such relief on collateral review.

As this Court stated in United States v. Addonizio, 442 U.S. 178, 184 (1979) (footnotes omitted): "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds

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_/ We note in addition that in Brown the Government had conceded that Dansker required reversal at least of the RICO conspiracy count (583 F.2d at 669). It is impossible to say how the Third Circuit would have decided the case in the absence of such a concession.

for collateral attack on final judgments are well known and basic to our adversary system of justice." The Court has repeatedly held that a claimed error, in order to justify relief on collateral review, must be so fundamental that it would result in a "complete miscarriage of justice." Id., at 184-185; Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); Davis v. United States, 417 U.S. at 346; Hill v. United States, 368 U.S. 424, 428 (1962); cf. Houser v. United States, 508 F.2d 509, 513-518 (8th Cir. 1974). Petitioners' claim that their RICO convictions are flawed rests on the suggestion that the jury, although convicting them of acts of wire fraud described in the indictment as part of the ongoing RICO project, may have thought that those acts were not related to the RICO enterprise. Such a speculative, attenuated objection does not suggest a fundamental error. Further review would be inappropriate. _/

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1987

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_/ Petitioner Jones also argues (87-5266 Pet. 10-12) that another effect of the decision in Dowling is to constructively amend the indictment, in violation of his right to be indicted by a grand jury. The courts below correctly rejected this claim, which is insubstantial. As the district court pointed out, petitioner could cite no case in support of his argument that a post-conviction change in the law acts to amend an indictment. Furthermore, there is no reason to distinguish this situation from one in which convictions are reversed on appeal based on insufficient evidence or trial error; in such cases it is never suggested that the indictment has been constructively amended by the action of the appellate court. Finally, the district court observed that it would be anomalous for the defendants to argue on one hand that their convictions should be modified because of the Dowling decision, and on the other hand to claim that those modifications impermissibly amend the indictment. 639 F. Supp. at 183.

# SUPREME COURT OF THE UNITED STATES

87-5170 JOHN C. McCULLOCH
*v.*
UNITED STATES

87-5266 JERRY HERBERT JONES
*v.*
UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 87-5170 AND 87-5266. Decided November 9, 1987

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In March, 1981, petitioners were tried for their participation in an interstate network that duplicated and distributed unauthorized reproductions of copyrighted sound recordings—so-called "pirated" tape recordings. At the conclusion of their trial, the petitioners were convicted of numerous counts of interstate transportation of pirated tapes (18 U. S. C. §2314), conspiracy to violate the copyright laws, and wire fraud. Also, using these substantive convictions as "predicate acts," the Government successfully prosecuted petitioners for conducting (and conspiring to conduct) a racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U. S. C. §§1962(c) and (d).

Subsequently, in *Dowling* v. *United States*, 473 U. S. 207 (1985), this Court held that criminal penalties could not be imposed for interstate transportation of pirated tapes under 18 U. S. C. §2314. As a result, petitioners initiated this action, pursuant to 28 U. S. C. §2255, to have their convictions set aside. The district court vacated the convictions under §2314, but refused to alter petitioners' convictions for wire fraud or the RICO violations. *Cooper* v. *United States*,

639 F. Supp. 176 (M. D. Fla. 1986). The Court of Appeals affirmed in a judgment order, relying on the district court's opinion. App. to Petn. 87-5170 A-2.

These petitions present the question of whether a RICO conviction may stand when some—but not all—of a defendant's convictions for the predicate acts which are the basis of his RICO conviction are vacated. Here, the district court vacated six of petitioner McCulloch's eleven predicate-act convictions, and six of petitioner Jones' fourteen convictions. *Cooper*, *supra*, 639 F. Supp., at 187. The jury's verdict on the RICO counts did not indicate which of these various predicate acts formed the basis on which it found "a pattern of racketeering activity." 18 U. S. C. § 1962(c). The district court allowed the RICO convictions to stand.

The courts below followed a prior decision of the Fifth Circuit, *United States* v. *Peacock*, 654 F. 2d 339 (CA5 1981), cert. denied, 464 U. S. 965 (1983). There, the Fifth Circuit vacated several convictions for predicate acts committed by three RICO defendants, but concluded that where "each of the appellants [was properly] convicted of at least two racketeering acts which were related to the . . . enterprise," their RICO convictions remained valid. *Peacock*, *supra*, 654 F. 2d, at 248. The Fifth Circuit recognized that this holding was in conflict with an opposing conclusion reached in *United States* v. *Brown*, 583 F. 2d 659 (CA3 1978), cert. denied, 440 U. S. 909 (1979), where the Third Circuit reversed two defendants' RICO convictions when two of their four convictions for predicate acts were found to be invalid. *Brown*, *supra*, 583 F. 2d, at 669. The Seventh and the Ninth Circuits have recognized this conflict, but have declined to adopt either position to date. *See United States* v. *Anderson*, 809 F. 2d 1281, 1284-1285 (CA7 1987); *United States* v. *Lopez*, 803 F. 2d 969, 976 (CA9 1986), cert. denied, —— U. S. —— (1987).

Because of the disagreement and uncertainty among the Courts of Appeals over the proper application of this impor-

tant federal criminal statute, I would grant certiorari to resolve the conflict.